

NEW HAMPSHIRE
SUPREME COURT
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STATE OF NEW HAMPSHIRE

SUPREME COURT 2007 MAY 30 A 9:20

MAY TERM

NO. _____

Michael K. Addison

v.

Kelly A. Ayotte, New Hampshire Attorney General
Marguerite Wageling, Hillsborough County Attorney
John Safford, Clerk, Hillsborough (North) Superior Court
Marshall Buttrick, Clerk, Hillsborough (South) Superior Court

**Petition for Writ of Mandamus to Bar the State from Seeking the Death Penalty, or in the
Alternative, to Enjoin All Proceedings Pending the Implementation of Rules to Govern
Appellate Review of a Death Sentence**

Michael K. Addison moves to bar the State from seeking the death penalty.

In the alternative, he moves to enjoin any proceedings against him in the Hillsborough County Superior Court, including prosecutions for capital murder; reckless conduct and felon in possession of a firearm; armed robbery and conspiracy to commit armed robbery; and armed robbery and felon in possession of a dangerous weapon. The injunctive relief must take effect forthwith, and must remain pending this Court's adoption of rules governing the appellate review of a death sentence that satisfy applicable statutory, state and federal constitutional standards.

In the event a jury returns a death verdict against Mr. Addison, he is entitled to specialized appellate review. RSA 630:5, X states that rules shall govern this Court's review of death sentences. The legislature has thus directed this Court to promulgate rules. It has not. The same Attorney General's Office seeking to execute Mr. Addison did not propose any rules

before it sought the death penalty in this case. The Court must fulfill the legislature's mandate. Otherwise, Michael Addison is facing death, without knowing how this Court will determine if the sentence should stand. It would be gravely unjust for this Court, and the society it represents, to permit this case to proceed absent rules that explain the specialized appellate review procedure.

If Mr. Addison is compelled to proceed without knowing what rules govern appellate review of a death sentence, and the jury returns a death verdict, this will violate not only his statutory right to such rules, but his state and federal constitutional rights to due process, effective assistance of counsel, effective appellate review of a death sentence, and against the imposition of cruel or unusual punishments. N.H. Const. pt. I, arts. 15, 18 & 33; U.S. Const. Ams. V, VI, VIII, XIV.

Accordingly, Mr. Addison seeks an immediate stay of all proceedings followed by either an order barring the State from seeking the death penalty, or an injunction against further proceedings until this Court promulgates appropriate rules.

Questions Presented for Review

Whether the absence of rules governing appellate review of a death sentence compels an order from this Court barring the State from seeking the death penalty in this case, or in the alternative, an order staying all proceedings pending the promulgation of appropriate rules?

Relevant Constitutional and Statutory Provisions

RSA 630:1 & 5; RSA 636:1, I(b); RSA 629:3; RSA 159:3, I; N.H. Const. pt. I, arts. 15, 18, 33; U.S. Const. Ams. V, VI, VIII, XIV.

**Statement of the Case, Statement Regarding Stage of Proceedings,
List of Parties and Counsel**

1. Michael K. Addison is an indigent criminal defendant currently being held without bail at the New Hampshire State Prison in Concord. He stands charged in four matters:

-In Hillsborough County (North) Superior Court, he is charged with capital murder. The indictment alleges that, on October 16, 2006, he knowingly killed Manchester Police Officer Michael L. Briggs while Officer Briggs was acting in the line of duty. Trial is scheduled to begin in September of 2008.

-In Hillsborough County (North) Superior Court, he is charged with reckless conduct and being a felon in possession of a firearm. These charges allege that on October 15, 2006, he discharged a firearm at an apartment building in Manchester. Trial is scheduled for October 29, 2007.

-In Hillsborough County (South) Superior Court, he is charged with armed robbery and conspiracy to commit armed robbery. These indictments allege that on October 11, 2006, he robbed a 7-Eleven store in Hudson. Trial is scheduled for December 10, 2007.

-In Hillsborough County (North) Superior Court, he is charged with armed robbery and being a felon in possession of a dangerous weapon. These indictments allege that he robbed a restaurant in Manchester on October 10, 2006. Trial is scheduled for February 19, 2008.

2. The State has filed a notice, pursuant to RSA 630:5, I, to seek the death penalty in the event Mr. Addison is convicted of capital murder. In its notice, it has set forth non-statutory aggravating factors that include the facts underlying the three Hillsborough County felony prosecutions. See RSA 630:5, I(b)(referring to non-statutory aggravating factors). In other words, those cases have implications beyond the scope of any conviction or committed prison sentences that may accompany such convictions.

3. In all of the above cases, Mr. Addison is represented by Donna Brown, Richard Guerriero and David Rothstein of the New Hampshire Public Defender. Attorneys Brown and Guerriero are at 117 N. State Street in Concord. Attorney Rothstein is at the Appellate Defender Program, Franklin Pierce Law Center, 2 White Street, Concord.

4. In the capital murder prosecution, the State is represented by the New Hampshire Attorney General, 33 Capitol Street, Concord. Four members of that office have filed appearances: Attorney General Kelly Ayotte, and Senior Assistants Jeffery Strelzin, N. William Delker, and Karen Huntress.

5. In the felony prosecutions, the State is represented by the Hillsborough County Attorney, Marguerite Wageling, 300 Chestnut Street, Manchester, 03101. Two members of her office have filed appearances: Maureen O'Neil, and Karen Gorham. Senior Assistant Attorney General N. William Delker has filed an appearance on behalf of the Attorney General's Office.

6. John Safford is the Clerk of the Hillsborough County (North) Superior Court, 300 Chestnut Street, Manchester, 03101. Marshall Buttrick is the Clerk of the Hillsborough County (South) Superior Court, 30 Spring Street, P.O. Box 2072, Nashua, 03061-2072.

Mandamus Rule and Jurisdictional Basis for Review

7. This Court has mandamus jurisdiction pursuant to RSA 490:4. Supreme Court Rule 11 governs petitions for original jurisdiction. “Petitions requesting this court to exercise its original jurisdiction shall be granted only when there are special and important reasons for doing so.” Sup. Ct. R. 11(1). “It is well settled . . . that we will exercise our original jurisdiction . . . in circumstances where the parties desire, and the public need requires, a speedy determination of the important issues in controversy.” Petition of Mone, 143 N.H. 128, 132 (1998) (holding exercise of original jurisdiction, and immediate review, necessary to resolve personnel dispute in court system) ; see also, Appeal of McDonough, 149 N.H. 105, 109-10 (2003)(holding exercise of original jurisdiction necessary to resolve ballot dispute).

8. The standard is satisfied here. Michael Addison cannot defend himself against a death sentence, and assure himself of the benefit of appellate review in that event, without knowing what rules will govern that review by this Court, how he is to make an appropriate record for review in the trial court, and how he is to make critical strategic decisions in not only the capital case, but the felony cases upon which the State will rely to seek his death. Since the death penalty statute mandates the enactment of rules to govern appellate review, and this Court has exclusive rulemaking authority, only this Court can determine what consequences that attach to the fact that there are no such rules. Moreover, as is explained below, the lack of rules

implicates constitutional rights, and “[i]t is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it.” Monier v. Gallen, 122 N.H. 474, 476 (1982)(exercising original jurisdiction regarding redistricting dispute).

9. The question of how this Court will review a death sentence raises issues of singular importance. Mr. Addison seeks to invoke this Court’s original jurisdiction and its inherent power to immediately review the issues he raises. For the reasons that follow, he seeks an order that no death penalty prosecution can proceed, because rules governing appellate review have not been promulgated. In the alternative, he seeks an injunction against further proceedings in any of the four cases outlined in Paragraph One, pending implementation of clear and constitutionally-adequate rules.¹

Mr. Addison Cannot Defend Himself in Any Pending Case Without Knowing What Rules Will Govern Appellate Review of a Death Sentence

10. RSA 630:5 sets forth the process in capital murder prosecutions. Essentially, the trial court proceedings have two phases: a guilt/innocence phase, and then, in the event the jury returns a verdict of guilty on capital murder, a sentencing phase before the same jury. At the sentencing phase, the jury weighs aggravating and mitigating factors, and returns a sentence of life without parole or death. See generally, RSA 630:1 (capital murder statute); RSA 630:5, II(a), III-IX (sentencing trial procedure).

¹Mr. Addison reserves his right to challenge the adequacy and sufficiency of any rules this Court may adopt, and to challenge the procedures by which those rules are adopted.

11. In common practice, there is a seamless transition from a guilty finding to the sentencing phase of the trial. Thus, as a practical matter, while Mr. Addison maintains his innocence of all charges, and intends to fully challenge each element of each offense, he is simultaneously preparing to ask the jury to spare his life. To say that this is an exceptionally work-intensive endeavor would grossly understate the magnitude of the task. Counsel need to investigate every facet of his life, review thousands of pages of documents in addition to the thousands of pages of discovery, speak to countless witnesses, and determine how to best present a case for life. In so doing, counsel may seek independent evaluations of Mr. Addison, will read reams of literature and statistical studies on the death penalty, and will determine what information is most likely to persuade a jury not to kill him.

12. At the same time he is preparing his factual defenses, and his case for mitigation, Mr. Addison is also mounting dozens of legal challenges to the death penalty, the New Hampshire capital murder statutes, the grand jury, and the capital murder indictment. Currently, the court presiding over the capital case (McGuire, J.) has set three deadlines for the filing of major challenges. Motions challenging the death penalty or the statute that do not require an evidentiary hearing are due on July 9, 2007, with a hearing to follow on August 15. Motions challenging the grand jury or indictment are due September 3, 2007, with a hearing to follow on October 11. Motions challenging the death penalty which require an evidentiary hearing are due on January 4, 2008, with a hearing to follow on February 7, 2008.

13. The defense represents that among these motions will be challenges to the death penalty on grounds that it is arbitrarily enforced and discriminatorily imposed, especially in New

Hampshire, and especially in the case of African-American males such as Michael Addison. The defense will assert that the death qualification standard produces petit juries that are inherently unfair and biased markedly in favor of the State. It will assert that the death penalty violates the proportionality standard of the state constitution, and more particularly, that a sentence of death against Mr. Addison is disproportionate as applied to the facts of his case, and to him. In addition, the defense will challenge the legal sufficiency of the aggravating and mitigating factors in the New Hampshire statute both facially, and as those factors apply to this case.²

14. Under the New Hampshire statute, there is mandatory appellate review of a death sentence. RSA 630:5, X-XII. Thus, in addition to formulating a factual defense to the charges, making innumerable strategic decisions regarding how to defend all of the charges, and building the case for Mr. Addison's life, counsel must prepare for not only normal appellate review, but this specialized review, which has no analog in New Hampshire law. This is especially critical since only this Court can overturn a death verdict, RSA 630:5, V, and there is no pre-sentence investigation or report. RSA 630:5, III.³

15. RSA 630:5, X states that there are rules governing this specialized, mandatory, and extremely critical appellate review. This Court has not promulgated any rules. The Attorney General's Office has not proposed any rules as far as the defense is aware. As is made clear

²There are many other motions. However, the ones described in this paragraph seem to relate most closely to the specialized appellate review that is the subject of this petition.

³The defense will challenge these aspects of the statute in a separate pleading, that will, in the first instance, be filed in superior court.

below, other death penalty states have sophisticated rules that require the trial judge to make factual findings, and explain precisely how appellate review, especially in regard to proportionality, will occur. For the reasons that follow, without rules, this case cannot go forward.

**Arguments in Support of Barring Death Penalty, or Enjoining Proceedings Pending
Promulgation of Rules to Effectuate RSA 630:5, X - XII**

16. RSA 630:5, X- XII provide that this Court will automatically review a sentence of death. Under RSA 630:5, X, “[s]uch review . . . shall be heard in accordance with rules adopted by [this] court.” In conducting the review, the Court determines whether the death sentence was “(a) . . . imposed under the influence of passion, prejudice or any other arbitrary factor; and . . . (b) [w]hether the evidence supports the jury’s finding of an aggravating circumstance, as authorized by law; and . . . (c) [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” RSA 630:5, XI As a result of the review, the Court has the authority to “[s]et the [death] sentence aside and remand the case for resentencing.” RSA 630:5, XII.

Other Death Penalty Jurisdictions Have Extensive Rules

17. A survey of other death penalty jurisdictions indicates that many have specific and often elaborate rules or statutes, or requirements that trial judges complete detailed reports, to facilitate appellate review of a death sentence. See, e.g., Ala. Code §13A-5-53(b); Conn. R. App. Proc. 67-6(b); Del. Code Ann. tit. 11, §4209(g); Fla. R. App. Proc. 9.142(a)(6); Ga. Code Ann. §17-10-35; Idaho Code §19-2827; Ky. Rev. Stat. Ann. 532.075; La. Sup. Ct. R. XXVIII;

Md. R. § 4-343; Miss. Code Ann. § 9-19-105; Mo. Rev. Stat. § 565.035.1; N.Y. R. Ct. App. Capital Cases §510.18; N.J. Sup. Ct. R. 2:9-12; Okla R. Crim. Ct. App. §XIII, Form 13.12; S. C. Code Ann. §16-3-25; S.D. Codified Laws Ann. §23A-27A; Tenn. Sup. Ct. R. 12; Va. Code Ann. §17.1-313; Wash. Rev. Code Ann. §10.95.120 & 130; Wyo. Stat. Ann. §6-2-103. In general, these rules or statutes either explain the nature and scope of appellate review, establish procedures and standards to govern proportionality review in particular, or require the trial judge to complete a comprehensive, case-specific report that is intended to facilitate appellate review of a death sentence. It is imperative that this Court address the rules issue in this state before this case proceeds further.

Practical Considerations Support Need for Rules

18. A number of practical considerations support the need for special rules governing appellate review of a death sentence.

19. First, under the death penalty statute, only this Court can overturn a death sentence based on insufficient evidence of an aggravating circumstance, or the influence of other factors indicating the jury did not act lawfully and rationally in imposing the sentence. RSA 630:5, XI. This procedure is quite opposite the norm, where this Court affords extreme deference to the fact-finder's determination. The statute does not set forth an applicable standard of appellate review, nor provide any information as to what factors this Court will consider in conducting its review. Cf. Ala. Code §13A-5-53(b)(2)(rule expressly requires court to independently weigh aggravating and mitigating factors); Del. Code Ann. tit. 11, §4209(g)(2)(court considers totality of evidence and character and propensity of offender).

20. Second, there is no pre-sentence investigation before sentencing. RSA 630:5, III. A pre-sentence investigation is invaluable because it condenses critical facts in a manner that facilitates an objective appellate sentence review of the trial judge's sentence by the Superior Court's Sentence Review Division. A number of states have appellate rules that require the trial judge to complete a detailed questionnaire and submit it so the reviewing court can, at a glance, learn basic information about the case, the defendant, and the reasons underlying the sentence of death before examining a voluminous record. See, e.g., Ga. Code Ann. §17-10-35(a); Idaho Code Ann. §19-2827(a); Ky. Rev. Stat. Ann. 532.075; La. Sup. Ct. R. XXVIII, §3 and App. B; Md. R. § 4-343(k); Mo. Rev. Stat. § 565.035.1; N.Y. R. Ct. App. Capital Cases §510.18 ("data report"); Okla. R. Crim. Ct. App. §XIII, Form 13.12; S.C. Code Ann. §16-3-25(A); Tenn. Sup. Ct. R. 12; Wash. Rev. Code Ann. §10.95.120; Wyo. Stat. Ann. §6-2-103(b). Some of these questionnaires are attached to this petition.

21. The questionnaires not only make review less cumbersome, by compiling basic information about the case, but allow the Court to learn highly specific information about the defendant's mental status, see La. Sup. Ct. R. XXVIII (defendant's intelligence level); Tenn. Sup. Ct. R. 12 (evaluations of defendant) ; Wash. Rev. Code Ann. §10.95.120 (character and behavioral disorders); allow the Court to discern the racial composition of the jury and the county in which the defendant stood trial, see La. Sup. Ct. R. XXVIII; Okla. R. Crim. Ct. App. §XIII, Form 13.12; Tenn. Sup. Ct. R. 12; Wash. Rev. Code Ann. §10.95.120; guide the Court's determination with regard to sentences in similar cases, see La. Sup. Ct. R. XXVIII; Tenn. Sup. Ct. R. 12; Wash. Rev. Code Ann. §10.95.120; and allow the Court to gauge whether pretrial publicity may have influenced the jury, see La. Sup. Ct. R. XXVIII; Okla. R. Crim. Ct. App.

§XIII, Form 13.12 (pretrial publicity); Tenn. Sup. Ct. R. 12 (whether defendant asked for change of venue); Wash. Rev. Code Ann. §10.95.120 (publicity). One report even asks the trial judge, as “thirteenth juror,” whether she agreed that the State proved its case beyond a reasonable doubt. Tenn. Sup. Ct. R. 12. Such a report would, thus, not only inform appellate review, but would guide the parties, and the trial court, in providing this Court a comprehensive record.

22. Third, rules would permit Mr. Addison to understand the scope and nature of the Court’s proportionality review. States have taken different approaches in this regard. Some, like Arizona, Arkansas, California, Colorado, Idaho, Kansas, and Pennsylvania do not mandate proportionality review. Others, like Alabama, Florida, North Carolina and Oregon, do, but have no apparent rules.

23. Other states either have rules that direct the court, or other official, to compile information for purposes of comparison to the case on appeal, or further define the proper class of “similar cases” for proportionality review. See, e.g., Conn. R. App. Proc. §67-6(b)(defining class of cases for review); Del Code Ann. tit. 11, §4209(g)(“similar cases arising under this section ”); La. Sup. Ct. R. XXVIII (proportionality review and Uniform Capital Sentencing Reports); Mo. Rev. Stat. § 565.035.6 (“assistant” to the court compiles data on all death and life without parole sentences from 1977 forward); N.Y. R. Ct. App. Capital Cases §510.18 (data reports from all cases compiled); N.J. Sup. Ct. R. 2:9-12 (designating special master who gathers data for proportionality review); S.C. Code Ann. §16-3-25(E)(court must include in its proportionality analysis reference to similar cases it considered); S.D. Codified Laws §23A-27A-8 (“The Supreme Court shall accumulate the records of all capital felony cases that the court deems appropriate. The court may employ an appropriate staff and such methods to compile the

data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.”); Va. Code Ann. §17.1-313(E)(court may accumulate records to determine whether sentence excessive and shall consider available records); Wash. Rev. Code §10.95.130(2)(b)(defines “similar cases”).

24. The New Hampshire death penalty statute does not provide any guidance on the nature of the proportionality review this Court will undertake. It does not indicate what types of cases the Court will look at, e.g., only other capital cases; only other capital cases in which the defendant has killed a law enforcement officer; or a broader class of cases, like those cases in which the State could have, but did not, charge the defendant with capital murder. If Mr. Addison does not know the scope and nature of this Court’s proportionality review, he cannot fashion appropriate motions, or ensure that the Court has all of the appropriate factual and statistical information, to perform this review.

Statutory Language Compels Adoption of Rules

25. The Court construes the words of a statute according to their plain language and ordinary meaning. Cui v. Town of Barrington, No. 2006-430, slip op. at 2 (N.H. May 15, 2007). This Court gives effect to all words in a statute, and does not presume that the legislature has included statutory language that is merely superfluous. In re Albert, No. 2006-139, slip op. at 3 (N.H. April 18, 2007).

26. RSA 630:5, X states that rules shall govern this Court’s review of death sentences. The legislature has thus directed this Court to promulgate such rules. It has not. It must fulfill the legislature’s mandate. Otherwise, Michael Addison is facing death, without knowing how

this Court will determine if the sentence should stand. It would be gravely unjust for this Court, and the society it represents, to permit this case to proceed absent rules that explain the specialized appellate review procedure.

Constitutional Arguments in Support of Petition

Constitutional Argument #1: Rules Effectuate Constitutionally-Mandated Review of Death Sentences

27. Beyond the statutory requirement of appellate review, the United States Constitution requires appellate review of any death sentence imposed pursuant New Hampshire's capital sentencing law. The United States Supreme Court "has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" Caldwell v. Mississippi, 472 U.S. 320, 329(1985) (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)). Meaningful appellate review plays a crucial role in ensuring that the death penalty is not imposed arbitrarily or irrationally.

If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id.*, at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. *See, e. g., Clemons, supra*, at 749 (citing cases); Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). . . . It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record. "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

Parker v. Dugger, 498 U.S. 308, 320-321(1991) (reversing because Florida Supreme Court failed to conduct an independent review of mitigating evidence in the record).

28. The capital sentencing procedure adopted by our legislature specifically requires that the New Hampshire Supreme Court play a critical role in “ensuring that the death penalty is not imposed arbitrarily or irrationally.” RSA 630:5, X-XII; Parker, supra. The Court is required to review the sentence not only regarding arbitrariness and rationality, but also regarding proportionality and sufficiency of the evidence for aggravating factors. RSA 630:5, XI.

29. Meaningful appellate review by this Court, as required by Part I, Articles 18 & 33 of the New Hampshire Constitution,⁴ and the Eighth Amendment, is simply not possible if the defense must present its case in the trial court without knowing specifically how the Court will review the case and what factors this Court will consider.

30. Rules that make clear how appellate review will occur in the event Mr. Addison is sentenced to death also help to ensure Mr. Addison’s rights to due process in sentencing. N.H. Const. pt. I, art. 15; U.S. Const. Ams. V, VI, XIV. A defendant who is sentenced to a year and a day in prison knows what rules will govern the appellate review of his sentence by the Superior Court Sentence Review Division. Super. Ct. Sentence Review Div. R. 15-20. It follows that an accused potentially facing death should know what rules will govern review of his sentence by this Court.

31. Mr. Addison’s rights in this regard under the state constitution are greater than those guaranteed by the federal constitution, since the state constitution affords enhanced due process

⁴Mr. Addison argues in Paragraphs 35 & 36, infra, that the New Hampshire Constitution affords greater protection than the Eighth Amendment.

protections in many other areas. See, e.g., State v. Fleetwood, 149 N.H. 396, 405 (2003)(New Hampshire Constitution “provides greater protection to a criminal defendant with respect to confessions than does the Federal Constitution.”)(citation omitted); State v. Roache, 148 N.H. 45, 49 (2002)(“The relevant text of Part I, Article 15 is broader than the Fifth Amendment.”); State v. Laurie, 139 N.H. 325, 330 (1995)(“We hold that the New Hampshire constitutional right to present all proofs favorable affords greater protection [than the federal constitution] to a criminal defendant.”). In fact, the Court has extended increased due process protections to convicted sex offenders facing life without parole. State v. McLellan, 146 N.H. 108, 115 (2001)(“the Due Process Clause of the New Hampshire Constitution requires proof beyond a reasonable doubt of prior convictions used to enhance a defendant’s sentence to life without parole under the provisions of RSA 632-A:10-a, III.”). Given the long-standing tradition of affording more process to those charged with crimes, it would be anomalous for this Court to deviate from that tradition in the case of a man who has been sentenced to death.

Constitutional Argument #2: Effective Assistance of Counsel

32. If there is any doubt as to why rules are so critical, one need only examine the imprecise language of RSA 630:5, XI. Based on the statutory language, it is unclear what standard of review this Court will employ with regard to any of the factors. It is unclear what the terms “passion,” “prejudice,” or “arbitrary factor” mean. It is unclear to what the phrase, “as authorized by law,” refers in subsection (b). Finally, it is totally unclear how this Court will undertake proportionality review, and to what cases the Court will compare Mr. Addison’s.

33. These deficiencies demonstrate why the legislature contemplated rules to explain,

with more precision, how appellate review will occur. The deficiencies also impair counsels' ability to fulfill their constitutionally-compelled mandate of providing effective assistance counsel at trial and on appeal. N.H. Const. pt. I, art. 15; U.S. Const. Am. VI. Without more specific guidance as to appellate review of a death sentence, counsel cannot effectively make strategic decisions either in the capital proceeding, or in the felony trials that, by virtue of the State's death penalty notice, are in integral part of that proceeding. If this Court adopts a questionnaire along the lines of those referred to in this petition, counsel need to know its contents, so it can provide the maximum amount of pertinent information for appellate review. Depending on the factors this Court will consider, counsel may want to explore particular avenues with regard to factual investigation of Mr. Addison's life circumstances, or may want to have him evaluated by particular medical or psychological professionals. Additionally, it is conceivable that the rules governing this Court's appellate review of a death sentence may influence counsels' decisions with regard to challenging evidence the State seeks to introduce, or having Mr. Addison exercise his right of allocution, in advance of the capital proceeding, in the event he is convicted of any of the felony charges he faces.

34. Moreover, this Court's rules of preservation of issues for appellate review are exacting. The Court will not consider, on appellate review, legal arguments that were not developed below, or arguments that rely on facts that were not presented to the trial court. See, e.g., Petition of the State of New Hampshire (State v. San Giovanni), No. 2005-040, slip op. at 6 (N.H. January 17, 2007)(argument not raised in superior court was not preserved for appellate review); Appeal of Kaplan, 153 N.H. 296, 301 (2006)(citing importance of developing sufficient factual record for appeal). Accordingly, without knowing, right now, and before conducting any

further litigation in any of the cases listed in Paragraph One of this petition, what rules and standards govern appellate review of a death sentence, counsel cannot know whether they are making a full and appropriate record – one that gives Mr. Addison the best chance of arguing that the Court must set aside a death sentence.

Constitutional Argument #3: Cruel or Unusual Punishment and Proportionality

35. Both the federal and state constitutions protect an accused criminal defendant against cruel and unusual punishments. N.H. Const. pt. I, arts. 18, 33; U.S. Const. Am. VIII. These provisions encompass the right to be protected against a disproportionate sentence, at least insofar as the defendant faces the death penalty. Harmelin v. Michigan, 501 U.S. 957 (1991); State v. Stearns, 130 N.H. 475 (1986). Since the text of Part I, Article 18 is far more expansive than anything in the federal constitution, and this Court has held that the goal of rehabilitation has “constitutional imprimatur,” State v. Evans, 127 N.H. 501, 505 (1985), this Court should follow the lead of other states and hold that the state constitution provides greater protection than the federal in regard to both the imposition of cruel or unusual punishments, and more specifically, disproportionate punishments. See State v. Whitfield, 134 P.3d 1203 (Wash. App. 2006); People v. Carmony, 127 Cal. App. 4th 1066 (Cal. App. 3 Dist. 2005); State v. Pedersen, 679 N.W. 2d 368 (Minn. App. 2004); State v. Smith, 48 S.W.2d 159 (Tenn. App. 2000); Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998); People v. Bullock, 485 N.W.2d 866 (Mich. 1992); State v. Brogdon, 457 So.2d 616 (La. 1984).

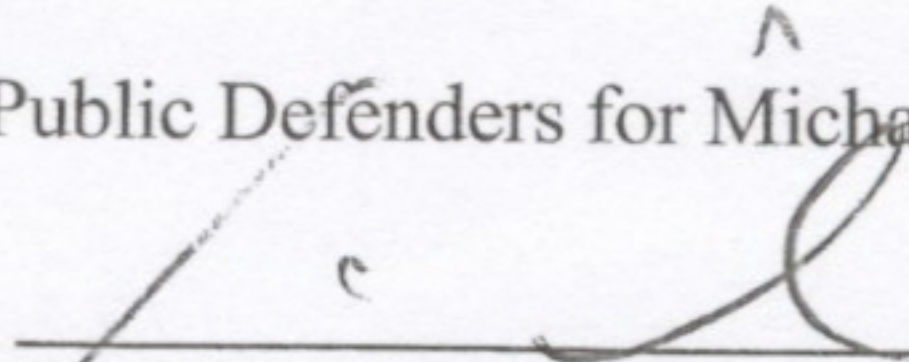
36. Michael Addison is facing the death penalty, in a state in which the sanction is rarely sought, and has not been imposed in nearly 70 years. Of all the processes and procedures in the

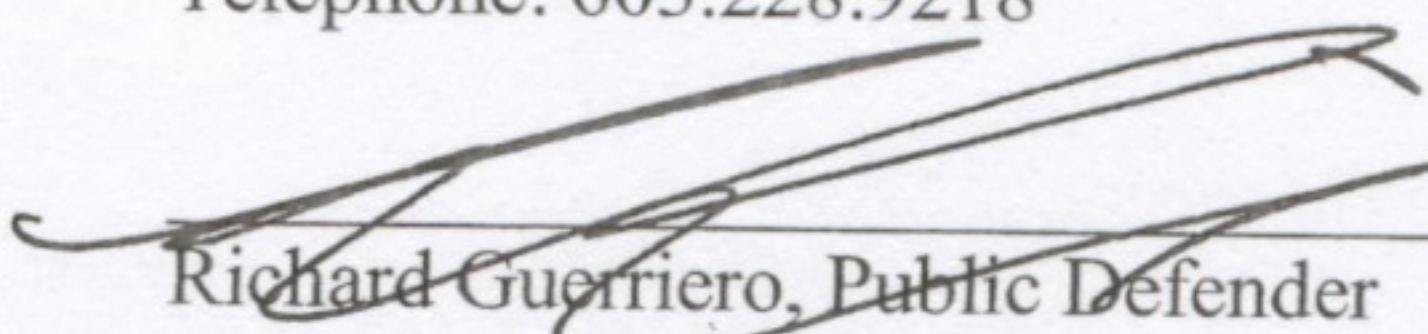
death penalty statute, those that govern this Court's review of a death sentence are among the most critical, as only this Court can address issues of improper influence on the jury, legal sufficiency of aggravating factor evidence, and proportionality. Without any rules to govern appellate review, counsel cannot prepare for this review and cannot make an adequate record for this review. Any process under which trial counsel cannot adequately safeguard the rights of a defendant sentenced to die exposes that defendant to punishment that not only offends due process and the right to effective assistance of counsel, but the right against the imposition of cruel or unusual punishments. Moreover, where the state constitution mandates that all punishments be proportionate, and condemns "sanguinary laws," but the death penalty statute provides no correlative procedures to implement these guarantees, the statute fails to adequately protect Mr. Addison's rights under Part I, Article 18.

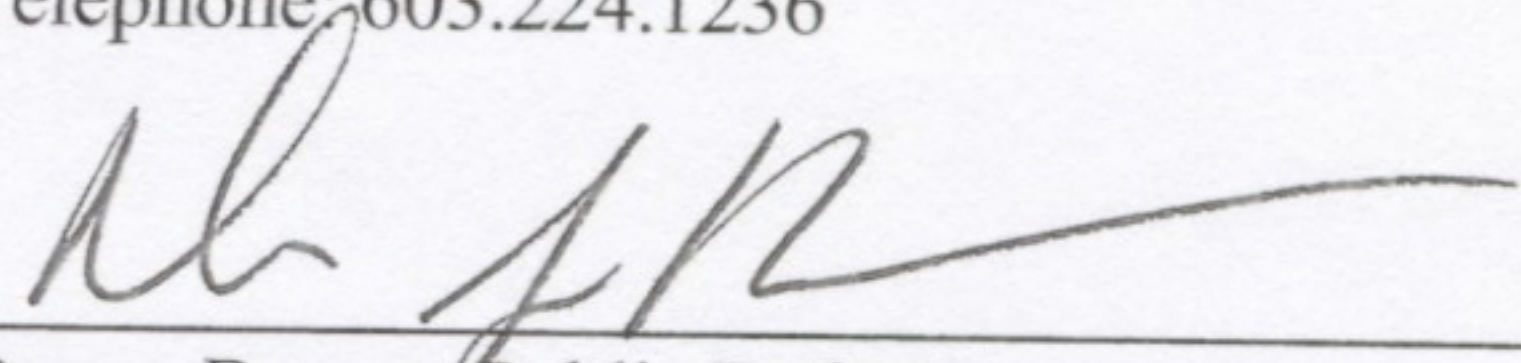
WHEREFORE, Mr. Addison respectfully requests that this Honorable Court:

- a. Stay all proceedings listed in Paragraph One of this petition pending resolution of the issues raised by the petition;
- b. Issue an order barring the imposition of the death penalty in this case; or, in the alternative,
- c. Adopt appropriate and constitutionally adequate rules governing this Court's appellate review of a death sentence.

Respectfully submitted this 30th day of May 2007 by Public Defenders for Michael Addison,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was forwarded on this 30th day of May, 2007, to the Kelly Ayotte, New Hampshire Attorney General; Marguerite Wageling, Hillsborough County Attorney; John Safford, Clerk, Hillsborough County Superior Court – North, and; Marshall Buttrick, Clerk Hillsborough County Superior Court – South.



David Rothstein